Supreme Court, U.S.
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CASE NO. 93-1191

# THE SUPREME COURT OF THE UNITED STATES
OCTOBER, 1993 TERM

**Ann Brunet and Denise Sachs, on behalf of themselves and the class they represent,**
*Petitioners,*

and

**Guy E. Tucker, James T. Meyer, Stuart J. Tudor, and Joseph S. Hilleary, on behalf of themselves and the class they represent,**
*Respondents,*

v.

**City of Columbus, Ohio, Columbus Civil Service Commission, Dana Rinehart, Alphonse Montgomery,**
*Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Was the Court of Appeals' use of the strict scrutiny standard in this gender bias case error, in light of this Court's adoption of the intermediate standard for gender bias cases in *Mississippi University for Women v. Hogan*, 458 U.S. 718,724, 102 S.Ct. 3331 (1982)?

2. Did the Court of Appeals contravene the holdings of this Court and other federal appellate courts by holding that the total exclusion of women firefighters until 1975, the use of discriminatory testing procedures between 1980 and 1986, and the gross disparity between the female applicant pool and women on the job did not support a gender conscious consent decree?

3. Is the singular fact that the male Intervenors were hired at the same time as were the female Petitioners sufficient injury under Article III to confer standing on the Intervenors individually and to allow them to represent the unnamed members of the class?

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## OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS IN THIS CASE

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Brunet v. City of Columbus, 1 F.3d 390 (6th Cir. 1993) *("Brunet II")*

## STATEMENT OF JURISDICTION

On July 28, 1993, the Sixth Circuit Court of Appeals entered its decision affirming the lower court's holding that the consent decree entered into between the Petitioners and Respondent City violated the Fourteenth Amendment to the Constitution. On October 4, 1993, the Sixth Circuit Court of Appeals denied Petitioners' Request for Rehearing and Suggestion of Rehearing *en banc*.

This Court has jurisdiction to entertain this Petition pursuant to 28 U.S.C. §1254(1).

## THE CONSTITUTIONAL AND OTHER PROVISIONS RELIED UPON

### United States Constitution, Article III, Section 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to all

Cases affecting Ambassadors, other public Ministers and Consuls; -- to all Cases of admiralty and maritime Jurisdiction; -- to Controversies to which the United States shall be a Party; -- to Controversies between two or more States; -- between a State and Citizens of another State; -- between Citizens of different States; -- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

**United States Constitution, Fourteenth Amendment, Section 1:**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

### A. Brunet I: Judicial Findings of Discrimination

The underlying action was filed against the City of Columbus, Respondent herein, in 1984 by a group of unsuccessful female firefighter applicants seeking to enjoin use of hiring practices which discriminated against women applicants. Following trial in February, 1986, the district court held for the plaintiffs, Petitioners herein, finding that the City had discriminated against female applicants on account of their sex, enjoined the City from utilizing the discriminatory physical capability test ("PCT") used for selection between 1980 and 1986, and enjoined use of strict rank order selection as discriminatory. *Brunet v. City of Columbus,* 642 F. Supp. 1214 (S.D. Ohio 1986), *appeal dismissed as moot,* 826 F.2d 1062 (6th Cir. 1987), *cert. denied,* 485 U.S. 1034, 108 S.Ct. 1593 (1988) (hereinafter "*Brunet I*"). The district court ordered the Respondent to design a non-discriminatory PCT and cut-score for use on scoring the PCT. In place of strict rank order selection, the district court gave the City the choice between attempting to validate ranking and scoring on a pass/fail basis. *Id.*, 642 F.Supp. at 1250.

Following the above order, the City presented a newly designed PCT in 1986 for approval by the district court and proposed a multiple cut-score, as required by the court's order. Again, the court found the test was discriminatory as designed. However, the court held that if one of the six physical events was eliminated, the PCT would be sufficiently job-related under Title VII. *Brunet I*, slip op., May 21, 1987. In addition, the lower court rejected the City's proposed

cut-score and adopted instead a cut-score based upon Petitioners proposed compensatory model. *Id.* The district court did not disturb its earlier injunction against rank order selection.

Additional appeals were filed by both parties from the district court's order. Sixth Cir. App. Nos. 87-3612 and 87-3645. While these appeals were pending, Petitioners became aware that the City had administered the 1986 PCT, including the enjoined event, to a group of applicants during the summer of 1988. Petitioners filed a contempt motion against the City and a hearing on the motion was held November 22, 1988.

While the 1987 appeals and the contempt action were pending, the City initiated settlement discussions with Petitioners, which culminated in the district court signing the consent decree of February 27, 1989. (Appendix-159.) The crux of the consent decree, the proportional hiring plan, required the City to "continue to appoint male and female applicants in proportion to the relative proportions of males and females achieving passing scores on the firefighter entry level test as a whole. . . ."[1] The parties dismissed their respective appeals as part of the settlement.

## B. Evidence of History of Discrimination against Women

The 1989 consent decree resulted from a long history of discrimination against women, severe under-

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[1] The district court had previously required "proportional hiring" on an interim basis. *Brunet I,* 642 F.Supp. at 1253.

representation as a result of this discrimination, and a hotly litigated case in which the City was found guilty of discrimination.

**1. Written policy against allowing women to apply:** Until 1975, a written policy existed against allowing women to apply to become firefighters. *Brunet,* 642 F.Supp. at 1223. The Court of Appeals said that "this designation ("male" job announcement) would clearly indicate that the City preferred, if not required, males over females for (the firefighter) position and would have the effect of discouraging women from applying for the job." *Brunet v. City of Columbus*, 1 F.3d 390, 408-09 (6th Cir. 1993) (Appendix-75) (hereinafter "*Brunet II*").

**2. Thereafter, the City set out to alter its selection procedure to one which it knew would result in severe adverse impact to women applicants and had reason to believe was not job related:** Historically, the City's entry level firefighter examination has consisted of two portions: a cognitive ability test (CAT) and a physical capability test (PCT). Prior to 1980, the PCT was scored on a pass/fail basis only and applicants were hired based upon the ranked order of their scores on the CAT. Thus, the PCT had no effect on an applicant's ranking on the eligibility list. *Brunet I,* 642 F.Supp. at 1234-1235.

The first two women firefighters in the history of the Columbus Division of Fire were hired in 1979. 1986 Stip. No. 7. Denise Elmore and Diane Russell were hired pursuant to a court order requiring one-for-one hiring of black and white applicants as a result of a 1975 finding that the City had been guilty of race discrimination. *Dozier v. Chupka,* 395 F.Supp. 836

(S.D.Ohio 1975), *inj. dissolved,* 763 F.Supp. 1430 (S.D.Ohio 1991).[2]

Following the hiring of the first women firefighters, the *Dozier* race-based hiring order, and a final order in *Brant v. City of Columbus,* Case No. C2-75-425 (S.D.Ohio 1979) (in which the district court held that the City's physical capability test for police applicants discriminated against women), the City decided that for all future hiring of firefighters, it would change the scoring of the firefighter test and begin to rank order candidates on the basis of the combined PCT and CAT. The district court found that "a major change in approach from a pass/fail examination occurred in 1980 without any apparent consideration being given to possible greater adverse impact on women." *Brunet I*, 642 F.Supp. at 1236.

This decision was made despite known problems with the validity of the PCT, despite the City's Testing Chief's admitted knowledge that the change would result in a significant adverse impact on women, and despite the warnings of the Fire Division's EEO Officer, Lem Ferguson, that it would have an adverse impact on women. At the 1986 trial, Mr. Ferguson, who had been with the Division since 1960, testified that in 1980, women were represented throughout the eligibility lists on the basis of the written exam, but

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[2] In *Dozier*, the lower court ordered the City to hire one black for each white hired until the percentage of blacks on the force equalled the percentage of blacks in the labor market in Franklin County, and to maintain that percentage indefinitely. In 1991, the district court dissolved the hiring quota, finding that the City had substantially complied with the court's order after 16 years of compliance. *Id.*, 763 F.Supp. 1430.

when the PCT results were included in the ranked score, "the women ended in the cluster at the bottom of the list." Ferguson TR at 194, 197-198. Mr. Ferguson testified that he told the City testing personnel, including Chief of Testing S. David Kriska, that to avoid this adverse impact, the City should institute a job related cut score, and continue to grade the PCT on a pass/fail basis. *Id.*, at 198. Mr. Ferguson testified that the testing personnel ignored his suggestion and, after that, he was not invited to further meetings concerning changes in the testing procedure. *Id.*

**3. Under the new selection procedure, implemented after the first women were hired and in use between 1980 and 1986, no women applicants were hired except pursuant to the Dozier race-based hiring order:** It is undisputed that the only women hired between 1975 and 1986 were hired solely because of the *Dozier* hiring order. *Brunet I*, 642 F.Supp. at 1224; 1991 Stip. No. 5(c).

**4. The selection procedure utilized by the City between 1980 and 1986 was unlawfully discriminatory against women:** Between 1980 and 1986, the City tested two groups of applicants: one in 1980 and the other in 1984. All hirings between 1980 and 1986 came from these two groups. The only women hired from the 1980 eligibility list were hired solely because of the *Dozier* hiring order, and additional evidence showed a statistically significant difference in mean scores between male and female applicants on the 1980 list and that the PCT was the

source of this adverse impact.[3] The Court of Appeals found this evidence sufficient to establish that hiring from the 1980 list was discriminatory. *Brunet II*, 1 F.3d at 408 (Appendix-71).

In addition, the district court held that the hiring between 1984 and 1986 was discriminatory, since even with the *Dozier* order in force, the numbers of women who applied and were hired evidenced adverse impact, and the source of the adverse impact was the PCT. *Brunet I*, 642 F.Supp. at 1230. The court found that the 1984 PCT did not adequately reflect the requirements of the job, and was thus discriminatory under Title VII.

The district court also held that the City's use of rank order selection violated Title VII because the City could not establish that higher scores on the test meant better job performance. The injunction against the use of rank order selection existed until the 1989 consent decree was implemented.

**5. The City's newly designed 1986 PCT was also found by the district court to violate Title VII, and the court rejected the City's proposed pass/fail score for the PCT:** Again, the lower court found that the City's newly designed PCT discriminated against women. *Brunet I*, slip op. May 21, 1987. However, when one of the six events was eliminated, the district court found that the test was sufficiently job related to be used under Title VII.

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[3] The PCT administered in 1980 and 1984 were virtually identical. *Brunet I*, 642 F.Supp. at 1236.

The district court was particularly critical of the City's proposed pass/fail score for the PCT. Manipulating the data in a "wholly unacceptable" manner, *Brunet I* , 642 F.Supp. at fn.14, the City argued that under its proposed cut score (which would have a severe adverse impact on women), 93% of incumbent firefighters would pass the PCT. Rejecting this manipulation, the district court found that using the City's proposed cut-score, nearly one-half of the City's incumbent firefighters would fail the test. The court adopted the Petitioner's proposed compensatory model, setting the cut-score at one standard deviation below the mean of scores of incumbent firefighters.

**6. There continues to exist a manifest imbalance of women firefighters:** Not surprisingly, following the above history of discriminatory treatment, women make up only a small fraction of the Fire Division workforce. This imbalance was stipulated by the parties as a factor in entering into the consent decree. 1991 Stip. Nos. 5(b), (c), (d).

Over the years for which data are available, women have made up between approximately 6% and 10% of the eligible applicants to the position of firefighter and 45% of the workforce in Franklin County, Ohio. Yet, the selection of women from the City's hiring practices in the absence of affirmative action has amounted to the "inexorable zero."

At the time of trial in February, 1986, eleven years after the City began to allow women to apply, only 5 of 822 firefighters were women, or less than one percent (.72%) of the force. *Id.* At the time the 1989 consent decree was signed by the court, only 15 of 1009, or 1.50% of the force was female. *Id.* In 1992, when the

district court struck down the consent decree, there were 23 women firefighters of a total force of 1112, representing only 2% of the force. *Id.*, at Stip. No. 7.

### C. *Brunet II:* Tucker Challenge to the Consent Decree

The City hired firefighters pursuant to the consent decree without interruption nor objection until two and one-half years later when a group of male applicants filed suit to enjoin hiring pursuant to the consent decree under the Equal Protection Clause. *Tucker, et al v. James, et al.,* Case No. C2-91-616. On August 13, 1991, the district court granted the motion of the male applicants to intervene in the *Brunet* case. For purposes of clarity, the male Intervenors, Respondents herein, shall be referred to as the Intervenors.

Following hearing, the district court held that by entering into the consent decree in 1989, the City had intentionally discriminated against male applicants, and enjoined hiring under the terms of the consent decree. *Brunet II,* slip op., March 18, 1992 (Appendix-127).

Although the essence of the Intervenors' suit was that the City should be required to hire on the basis of strict rank order selection and most of the evidence presented by Intervenors at hearing went to that issue, the district court declined to find that strict rank order selection was valid. Instead, it required an additional hearing on the issue, in the event the City expressed a desire to revert to strict rank order selection. *Id.* Not surprisingly, the City did so indicate to the lower court, and an additional hearing was ordered by the court on two factual issues relating to strict rank order selection. Thereafter, the court approved the use of strict rank

order selection. *Brunet II,* slip op. July 24, 1992 (Appendix-102), and final judgment was entered on September 24, 1992. The Petitioners filed timely appeals from each of the above orders, and, in a consolidated appeal, the Sixth Circuit Court of Appeals affirmed the district court's finding that the consent decree violated the Fourteenth Amendment, and reversed and remanded the finding that strict rank order selection was valid. *Brunet II,* 1 F.3d 390 (6th Cir. 1993) (Appendix-5). Petitioners seek review of the judgment affirming the holding that the consent decree violates the Equal Protection Clause.

Specifically, the Court of Appeals held that the male applicants had standing to challenge the consent decree, even though their dates of hire were unaffected by operation of the consent decree. *Brunet II,* 1 F.3d at 401 (Appendix-43-44). In an inappropriate expansion of this Court's holding in *Northeastern Florida Contractors v. Jacksonville,* __ U.S. __, 113 S.Ct. 2297 (1993), the appellate court held that the mere fact that the male applicants were required to work with female applicants hired as a result of the consent decree amounted to a "diminution in employment status," sufficient to confer on them standing under Article III of the United States Constitution.

Secondly, in addressing the question of whether or not there was sufficient evidence of prior discrimination to justify the consent decree, the Court of Appeals departed from this Court's holding in *Croson* and the holdings of other appellate courts that followed *Croson.* The Court of Appeals disregarded evidence of a policy that excluded women as firefighters, tests that discriminated against women, and a manifest statistical

imbalance in the number of women firefighters. In so doing, the appellate court isolated and rejected the numerous evidentiary bases on which the 1989 consent decree was based.

Finally, the Sixth Circuit Court of Appeals applied a strict scrutiny standard in this gender based affirmative action case, while this Court and the Second, Fourth, Ninth, and District of Columbia Circuit Court of Appeals have required that gender based challenges be subject to the intermediate standard of review. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724, 106 S.Ct. 1490 (1982). Following the Court of Appeal's decision of July 28, 1993, Petitioners herein sought a rehearing and rehearing *en banc*, both of which were denied on October 4, 1993.

## ARGUMENT

### I. THE USE OF THE STRICT SCRUTINY STANDARD IN THIS CASE IS ERROR, IN LIGHT OF THE ADOPTION BY THIS COURT AND THE SECOND, FOURTH, NINTH AND DISTRICT OF COLUMBIA CIRCUIT COURTS OF APPEAL OF THE INTERMEDIATE STANDARD FOR GENDER BIAS CASES.

The Court of Appeals applied the strict scrutiny analysis in this gender discrimination affirmative action case under the Fourteenth Amendment. Brunet II, 1 F.3d at 404 (Appendix-53). The court relied upon its previous decision in *Conlin v. Blanchard*, 890 F.2d 811, 816 (6th Cir. 1989) (applying strict scrutiny to race and gender preference hiring), noting the conflict with the decision of the Ninth Circuit Court of Appeals in *Coral Constr. Co. v. King County*, 941 F.2d 910, 931 (9th Cir. 1991), *cert. denied*, __U.S. __, 112 S.Ct. 875 (1992) (applying intermediate standard in a case involving gender-based affirmative action).

This Court should grant *certiorari* to resolve the conflict between the Sixth and Ninth Circuit Courts of Appeals. The Could should then reverse the Court of Appeals' holding that strict scrutiny is appropriate in gender discrimination affirmative action cases, in light of this Court's holding in *Mississippi University for Women, supra,* that an intermediate standard should be applied in cases of gender bias under the Fourteenth Amendment:

> Our decisions also establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must

> carry the burden of showing an 'exceedingly persuasive justification~' for the classification .... The burden is met only by showing at least that the classification serves "important governmental objectives and the discriminatory means employed' are 'substantially related to the achievement of those objectives....'

*Id.*, 458 U.S. at 724, 102 S.Ct. at 3336 [citations omitted]; *see also*, *Stanton v. Stanton*, 421 U.S. 7,13, 95 S.Ct. 1373, 1377 (1975).[4]

In *Coral Constr. Co. v. King County, supra*, the Ninth Circuit Court of Appeals stated:

> Under intermediate scrutiny, a gender-based classification must serve an important governmental object, and there must be a direct, substantial relationship between the objective and the means chosen to accomplish the objective.

*Id.*, 941 F.2d at 931; *see also, Manufacturers Hanover Trust Co. v. United States*, 775 F.2d 459, 464 (2d Cir.); *cert. denied*, 475 U.S. 1095, 106 S.Ct. 1490 (1986); *United States v. Commonwealth of Virginia*, 976 F.2d 890, 895 (4th Cir.), *cert. denied, sub nom, Virginia Military Institute v. United States*, __ U.S. __, 113 S.Ct. 2431 (1993); *Wauchope v. U.S. Dept. of*

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[4] Justice Ginsburg, however, recently noted that it is an open question whether the strict scrutiny standard applies to classifications based on gender under the Fourteenth Amendment. *Harris v. Forklift Systems, Inc.*, __ U.S. __, 114 S.Ct. 367, 373, fn. (1993) (Ginsburg, J., concurring).

*State*, 985 F.2d 1407, 1412 (9th Cir. 1993); *United States v. DeGross*, 960 F.2d 1433, 1439 (9th Cir. 1992) and *Lamprecht v. F.C.C.*, 958 F.2d 382 (D.C. Cir. 1992).[5]

There is no reason to treat a plaintiff who was discriminated against by affirmative action any differently than a plaintiff who received any other form or gender based discriminatory treatment.

## II. THE COURT OF APPEALS CONTRAVENED THE HOLDINGS OF THIS COURT AND OTHER FEDERAL APPELLATE COURTS BY HOLDING THAT THE TOTAL EXCLUSION OF WOMEN FIREFIGHTERS UNTIL 1975, THE USE OF DISCRIMINATORY TESTING PROCEDURES BETWEEN 1980 AND 1986, AND THE GROSS DISPARITY BETWEEN THE FEMALE APPLICANT POOL AND WOMEN ON THE JOB DID NOT SUPPORT A GENDER CONSCIOUS CONSENT DECREE.

This Court, in its last pronouncement on what is the standard for upholding gender affirmative action plans, held that there must be "a 'strong basis in evidence for [the] conclusion that remedial action was

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[5] This Court granted *certiorari* in a case to decide whether the state may use peremptory challenges to strike members of a jury on account of their sex. *J.E.B. v. T.B.*, *cert. granted,* Case No. 92-1239, __ U.S. __, 113 S.Ct. 2330 (1993). This Court may establish the standard for proving sex-based discrimination cases under the Fourteenth Amendment in this case. See Petitioner's Brief in *J.E.B. v. T.B., supra.*

necessary.'" *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500, 109 S.Ct. 706, 725 (1989), quoting *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277, 106 S.Ct. 1842, 1849 (1986) (plurality opinion). This Court also stated that affirmative action may be justified by a *prima facie* case of discrimination. *Croson*, *supra*, 488 U.S. at 500, 109 S.Ct. at 725. A manifest imbalance in the work force is one way to show a *prima facie* case of discrimination.

The Court of Appeals in the case at bar applied a standard for determining the validity of affirmative action plans which runs contrary to *Croson*, *supra* and other decisions of this Court and virtually all other circuit courts of appeals that have decided the issue. In addition, recent decisions by federal courts reveal some uncertainty as to what type of evidence is sufficient to uphold affirmative action for women and blacks.[6] This Court should grant *certiorari* to resolve the disagreements among the courts of appeals and to settle the issue of what evidence is sufficient to support affirmative action. This Court should grant *certiorari* to answer the questions that have surfaced since the Court's decision in *Croson*, *supra*.

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[6] See, *Billish v. City of Chicago*, 989 F.2d 890 (7th Cir.)*(en banc)*, *cert. denied*, __ U.S. __, 114 S.Ct. 290 (1993) in which the Seventh Circuit Court of Appeals split 5 to 4 on the standard to be used in affirmative action cases. Also, compare the decision of the Court of Appeals in the case at bar with the decision of the trial court. The trial court appeared to require proof of prior judicial findings of intentional discrimination. The Sixth Circuit Court of Appeals disagreed with this finding but affirmed the decision on other grounds that are inconsistent with precedents established by this Court and other federal appellate courts.

### A. The Court of Appeals erred in holding that the City's pre-1975 all-male policy was too remote.

The Sixth Circuit Court of Appeals held that a policy prior to 1975 that did not permit women to become firefighters was too remote to support a 1989 consent decree that provided gender-conscious relief. In so doing, the Court of Appeals ignored the fact that the City of Columbus had instituted selection procedures that discriminated against women until 1986.[7] Holding that a past policy of total exclusion of women (or blacks) is too remote to support affirmative action is contrary to precedent established by this Court and other federal appellate courts. See, *United States v. Paradise*, 480 U.S. 149, 167, 107 S.Ct. 1053, 1064 (1987) (defendants had by 1972 excluded blacks from jobs for decades); *Stuart v. Roache*, 951 F.2d 44, 452 (1st Cir.), *cert. denied,* __ U.S. __, 112 S.Ct. 1948 (1992) (in 1970, 2% of the Boston Police Officers were black); *Howard v. McLucas*, 871 F.2d 1000,1007 (11th Cir.), *cert. denied, sub nom, Poss v. Howard,* 493 U.S. 1002, 110 S.Ct. 560 (1989) (blacks held only 3.3% of

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[7] The first women firefighters were hired in 1979. After women were permitted to become firefighters, the City changed its testing procedures to require candidates to be ranked on both the written and physical capability test, whereas when women were excluded, candidates merely had to pass the physical test and were ranked on the written test. The City knew that the 1980 test would have an adverse impact on women and made no attempt to reduce the adverse impact. The 1980 and 1984 firefighter test discriminated against women, as the lower courts have held. Although the City was able to validate its 1986 test through content validity, ranking had not been validated and had been found to be discriminatory. Therefore, in February, 1989, when the consent decree was filed, ranking on the firefighter test discriminated against women.

the supervisory positions in 1973); *Davis v. City and County of San Francisco*, 890 F.2d 1438, 1442 (9th Cir. 1989).

The holding of the Sixth Circuit Court of Appeals could set a dangerous precedent. This and federal appellate courts have upheld affirmative action consent decrees that were designed primarily to eliminate policies of the early to late 1970's that prevented blacks and women from becoming firefighters and police officers. Past exclusionary policies were primarily responsible for the severe underrepresentation of women and blacks in the country's safety forces in the 1980's and 1990's.

The ruling of the Sixth Circuit Court of Appeals, if allowed to stand, could have the effect of eliminating many race and gender conscious consent decrees throughout the country. The ruling might make it virtually impossible for cities to institute any program to eliminate the disparities that resulted from its past discriminatory practices and policies and might ensure that the safety forces would remain predominantly white male.

The Court of Appeals in the case at bar cited a D.C. Circuit Court of Appeals decision [*Hammon v. Barry*, 826 F.2d 73, 76-77 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1036 (1988)] in support of its holding that the pre-1975 exclusion of women from the Division of Fire was too remote. *Hammon* is inapposite to the instant case. In *Hammon*, after the discriminatory policy was ended 18 years before the affirmative action, the City, unlike the City of Columbus in the case at bar, did not engage in any discrimination against blacks and hired large percentages of black

officers. (50% between 1969 and 1981 and 75% thereafter.)[8]

On the other hand, in the case at bar, after the all-male policy ended, the City of Columbus instituted other discriminatory practices that prevented women from becoming firefighters. The male-only policy of the City must be considered as part of the City's discriminatory hiring practices that continued up until at least 1986. The 1980 and 1984 firefighter tests were held to discriminate against women. And although the 1986 firefighter test was held to be content valid, ranking on the 1986 test discriminated against women, because it had an adverse impact and had not been shown to be job related.

The City's policy that prevented women from becoming firefighters is certainly not too remote in time: the explicit policy ended only nine years before the *Brunet* suit was filed, and the exclusion of women extended until 1979, five years before this suit was filed. Furthermore, the consent decree was entered three years after the district court ordered the City to stop discriminating against women applicants.

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[8] See also, *Billish v. City of Chicago*, *supra*, in which the Seventh Circuit Court of Appeals pointed out that the City of Chicago discriminated against black applicants to the Police Department in 1972, but that the discriminatory practices were eliminated by a 1974 consent decree. *Id.*, 989 F.2d at 893. The majority of the Court, which took a restrictive view of affirmative action (see dissent, 989 F.2d at 897), still apparently believed that evidence of discrimination between 1972 and 1974 was probative on the issue of whether 1987 affirmative action was constitutional. *Id.*, 989 F.2d at 893.

### B. Contrary to the holding of the Court of Appeals, the discriminatory 1980 and 1984 firefighter tests support the gender-conscious consent decree.

The Court of Appeals held that the fact that the 1980 and 1984 firefighter tests discriminated against women did not support the consent decree, because the discrimination was remedied. The Court of Appeals noted that women were hired from the 1980 and 1984 firefighter tests in proportion to their percentage on the hiring lists.[9] If the 1980 and 1984 tests were the City's only discriminatory acts, the Court of Appeals might very well have been correct. However, the two firefighter tests are only part of the evidence that supports the consent decree and must be considered along with the past policy that prohibited women from becoming firefighters.

The Court of Appeals erred in not considering the 1980 and 1984 discriminatory tests in the context of a past policy that excluded women from the Fire Department. This Court and other appellate courts have never held that selection procedures, in the context of other practices that have prevented blacks or women from being hired, are irrelevant in determining whether consent decrees are constitutional. In fact, federal courts have considered

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[9] Because of a previous order that required the City of Columbus to hire one black for every white firefighter hired, the City hired four women from the 1980 list, which is what one would expect considering their numbers on the list. The federal judge in the case at bar ordered the City to hire women in proportion to the number of women that had passed the 1984 test after ruling that this test discriminated against women.

evidence of discriminatory tests probative of the issue of whether race or gender-conscious consent decrees are constitutional. See, *Stuart v. Roache*, *supra*, 951 F.2d at 452.

### C. The Court of Appeals erred in rejecting the statistics of a severe imbalance of men and women in the Columbus Division of Fire.

The Court of Appeals rejected evidence that women were severely underrepresented in the Columbus Division of Fire. As of the date of the trial court's decision finding that women had been discriminated against (1986), 6 of 822 or .72% of the City's firefighters were women. It was undisputed that all six of these women had been hired solely because of the race preferential hiring order in *Dozier v. Chupka*. There were undoubtedly so few women firefighters because of the pre-1975 all-male policy that excluded women and the discriminatory tests thereafter. The Court of Appeals, however, asserted that "this statistical information is not particularly helpful in showing discrimination or rebutting discrimination because there is no evidence of how many women desired the position, were qualified and yet were not hired." *Brunet II*, 1 F.3d at 407 (Appendix-70).

Contrary to what the Court of Appeals stated, the Petitioners presented the statistics of women who wanted, and were qualified, to become firefighters. The best evidence of the relevant labor market comes from the 1984 statistics, when the city EEO officer

made her best attempts to recruit women firefighters.[10] The uncontradicted evidence was that in 1984 11% of the firefighter applicants were women. It is impossible to present any accurate statistics on what percentage of the women (or men) were qualified to be firefighters *based on the results of the firefighter test,* because the test was held to be discriminatory. However, if one considers that those who pass the test are qualified, 6% of the candidates who passed were women, an obvious gross disparity from the .72% of the women who were then firefighters. Based on the 1980 statistics, 5.3% of the applicants were women and 3.3% of those who passed were women. In 1978, before the City started recruiting women, 4.5% of the applicants were women. If the number of applicants for every year from 1978 to 1990 is averaged, women constituted 9% of the applicants and 5% of those who passed the tests.[11]

Petitioners presented more evidence on the relevant labor market than has been required by other federal courts. A number of federal appellate courts have held that there are no special qualifications for police officers and firefighters. They have therefore held that one can determine whether there are imbalances by comparing the proportion of minorities and women in the police and fire departments with

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[10] The EEO Officer testified, in testimony cited by the Court of Appeals to show that the City had made the greatest strides to eliminate discrimination in 1984, when the percentage of women who applied increased by 6% over the percentage in 1980. See Tr. II, at 813.

[11] These statistics are contained in the Jt. App. III, 524, 525, 527, 531, 528, 580, and 1155.

their proportions in the population of the City. See, *Davis v. City and County of San Francisco, supra*, 890 F.2d at 1446-1447; *Donaghy v. City of Omaha*, 933 F.2d 1448, 1460 (8th Cir.), *cert. denied*, __ U.S. __, 112 S.Ct. 938 (1992); *Stuart v. Roache*, *supra*, 951 F.2d at 452; and *Peightal v. Metropolitan Dade County*, 940 F.2d 1394, 1404-1405 (11th Cir.), *cert. denied*, __ U.S. __, 112 S.Ct. 969 (1992). In the cases cited above, statistical imbalance constituted the primary basis for the affirmative action. If one assumes that women do not apply at the same rate as men and that there are special qualifications for the job of firefighter, the percentage of women who applied and passed the tests are the closest that one can get to determine the "appropriate" statistics. The appellate court's rejection of the only available evidence on the percentage of qualified women in the labor market (the percentage of women who had applied for the job and who had passed the test) makes it virtually impossible to show statistical imbalance in the work force.

### D. The Court of Appeals erred in rejecting statistics of significant disparity in test results since 1988.

The Court of Appeals stated that women constituted two percent of those who passed the 1988 firefighter test and that if there had been no court-ordered proportional hiring requirement, no woman would have been hired from the list. In addition, the court noted that 6% of those who passed the 1990 test were women, whereas, only one woman would have been hired "had it not been for the consent decree". *Brunet II*, 1 F.3d at 407 (Appendix-68). The Court of Appeals correctly concluded that "[t]hese statistics do indicate a significant disparity." *Id.*

The Court, however, held that the male Intervenors rebutted these statistics by showing that the reason that women would not have been selected is that, in the absence of proportional hiring, women would have ranked below men on a test that was proved to be job related. The Court stated that the City has known since 1987 that ranking on the firefighter test is job related.

The Sixth Circuit Court of Appeals, without support from any authority, decided that evidence and a judicial finding *after* the consent decree was struck down may be used to support the striking down of the consent decree. Such a holding is contrary to settled law and must not be allowed to stand.

In February, 1989, when the consent decree was signed, ranking on the firefighter test was enjoined as discriminatory against women. At the time the district court enjoined ranking, it gave the City a choice: it could either use a job related pass fail score to determine who were qualified applicants, or it could attempt to validate ranking by way of predictive and concurrent validity studies. In 1987, the City's expert completed a concurrent validity study and the City filed it. No discovery of the study had been completed nor had a hearing on the study been scheduled. The evidence was that the City did not know whether the Court would find that ranking was job related based upon that study.[12] In fact, the City believed that the concurrent validity study would not be sufficient to validate ranking, because the district court had also

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[12] The district court had previously rejected two studies by this same expert witness and his firm.

required a predictive validity study. Therefore, as of the date of the consent decree, ranking on the firefighter test was discriminatory.

The validity of ranking is irrelevant to whether or not the consent decree is constitutional. If, as in this case, the consent decree is supported by at least a prima facie showing of discrimination, that evidence is not rebuttable by an after-the-fact finding that ranking is valid. To hold otherwise would require parties to affirmative action consent decrees to predict with exacting precision what evidence on validity others may in the future be able to muster. It would also require parties to secure judicial determinations on all factual issues prior to entering into consent decrees. In short, such a holding means that no cities that have engaged in severe discrimination will enter into consent decrees to eliminate discrimination.

## III. THE SINGULAR FACT THAT THE MALE INTERVENORS WERE HIRED AT THE SAME TIME AS WERE THE FEMALE PETITIONERS IS NOT SUFFICIENT INJURY UNDER ARTICLE III TO CONFER STANDING ON THEM INDIVIDUALLY AND TO ALLOW THEM TO REPRESENT THE UNNAMED MEMBERS OF THE CLASS.

### A. The Court of Appeals' finding of a loss of 'competitive status' is not supported by the record.

This Court of Appeals found that a purported "diminution in employment status," without more, is sufficient injury to confer standing on three of the four

named Intervenors to attack a consent decree's proportional hiring plan.[13]

The Court of Appeals agreed with Petitioners that the three Intervenors (Tudor, Meyer, and Hilleary) were hired when they would have been hired in the absence of a consent decree, and thus did not have standing to challenge the consent decree on the basis of denial of a job or job opportunity. The three Intervenors received exactly the same seniority that they would have received if there had been no consent decree.[14] Nevertheless, the Court of Appeals found that the Intervenors suffered a loss of "competitive status" in employment, because they were hired at the same time as two Petitioners, Denise Sachs and Vickie Fox, and thus would have to compete on the job with these two individuals. *Brunet II*, 1 F.3d at 401 (Appendix-41-42).[15]

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[13] The Court of Appeals correctly held that the fourth intervenor, Guy Tucker, did not have standing. There was no evidence that he would have been selected in the absence of a consent decree, and injury to him was "merely speculative". *Brunet II*, 1 F.3d at 399 (Appendix -33).

[14] Jt. Stipulation No. 10 stated that all firefighters hired the same date received exactly the same seniority, for all purposes, including benefits and competition for positions.

[15] None of the parties, nor the trial court, made the argument that the intervenors suffered a diminution in competitive status. A good part of the oral argument focused on whether the injury was speculative or whether any of the intervenors would have been hired in the absence of the consent decree.

Before Intervenors filed suit, the City offered to hire two males, Meyer and Tudor, along with the rest of the scheduled class (which included Vickie Fox and Denise Sachs). The Intervenors did not agree, and they pursued their action. The district court granted the Intervenors' motion for a temporary restraining order, without a hearing, which prevented hiring under the consent decree. According to the temporary restraining order, Intervenors Tudor and Meyer would be hired but the two Petitioners, Sachs and Fox, would not be.

Petitioners sought an emergency stay from the Court of Appeals. The Court of Appeals, Martin, J., granted the stay and ordered an expansion of the class from 36 to 38 members, that would include Intervenors Tudor and Meyer, as well as Petitioners Sachs and Fox. The following day, the district court in effect stayed the Court of Appeals' stay, and Petitioners again received an emergency stay from the appellate court consistent with its earlier one. Intervenors Tudor and Meyer began the training academy along side Petitioners Fox and Sachs.

The asserted loss of competitive status resulted from the fact that if there had been no consent decree (and no emergency stay from the Court of Appeals), there would have been two fewer firefighters (1,110, instead of 1,112). The Court reasoned that because of the consent decree, the Intervenors would have to compete on the job against two more persons than they would have had to compete against if there had been no consent decree.

**B. The injury determined by the Court of Appeals has not been recognized by other federal courts nor this Court.**

The cases cited by the Court of Appeals do not support standing based on the court's interpretation of "competitive status".

The court's use of "competitive status" comes from language in this Court's opinion in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 766, 96 S.Ct. 1251, 1265 (1976). This Court held in *Franks*, *supra*, that competitive status seniority would determine employees' transfers, layoff, shift assignments, etc. This Court in *Franks*, *supra*, stated that employees who had less seniority would not be able to compete as well as those with greater seniority. Therefore, this Court held that victims of discrimination should receive the same seniority as they would have received in the absence of discrimination; i.e., the same seniority as those who received the jobs which the victims were denied.

This Court never suggested that victims of discrimination would suffer a loss of "competitive status seniority" if they received the same seniority as those who received the jobs which they were denied. Petitioners have found no case in which any court has held that a plaintiff has suffered injury because he/she received the same seniority (competitive status or benefits) as did persons who, because of the purported discrimination, also obtained the job.

The affirmative action standing cases cited by the Court of Appeals do not support the extreme position adopted by that court. This Court in *Regents of the*

*University of California v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733 (1978) found that a white student had standing to challenge affirmative action in a medical school because he was denied consideration for a position in the school, not because he was hired along with affirmative action applicants.

This Court recently held that white contractors had standing to attack minority set asides because they alleged a denial of consideration for contracts. *Northeastern Florida Contractors v. Jacksonville, supra.*[16]

These two cases have no application where, as here, none of the alleged victims of discrimination was denied consideration for a position. In fact, in the case at bar, the three alleged victims (the Intervenors) were hired on the same date they would have been hired even if there had been no consent decree.

Other appellate courts have required real injury in order for the plaintiffs to have standing to attack affirmative action decrees, certainly far more than the nebulous "diminution of competitive status" permitted in the case at bar. In *Donaghy v. City of Omaha, supra*, 933 F.2d at 1455, the Eighth Circuit Court of Appeals held that the person who attacked an affirmative action consent decree had standing to

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[16] "When the government enacts a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing." Id., 113 S.Ct. at 2303.

challenge only the fact that he was not *considered for a particular opening*.

The case at bar points out the need for a rigorous examination of whether named plaintiffs have standing to represent a class. The Intervenors' case was propelled by attorneys who wanted to overturn the consent decree and who paid virtually all the costs of the lawsuit. The attorneys represented clients who testified that they had nothing to gain from the litigation, and that their purpose in pursuing the litigation was to bring an end to the "quota". *Meyer Dep. Transcript*, 65; *Tudor Dep. Transcript*, 44; *Hilleary Dep. Transcript*, 6, 24, 26-28; and *Tucker Dep. Transcript*, 41-42, 49 (R-351). Standing for purposes of Article III of the Constitution requires more than a generalized dislike for affirmative action.

## IV. CONCLUSION

For the foregoing reasons, Petitioners respectfully urge this Court to grant their Petition for Writ of Certiorari and hear these important issues on the merits.

Respectfully submitted,


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